**International Transportation Service, Inc. *and* International Longshore and Warehouse Union, Office Clerical Unit, Marine Clerks Association, Local 63.** Case 21–CA–34968

February 18, 2005

## DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 10, 2003, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1] The General Counsel filed limited exceptions and a supporting brief, and the Respondent filed a brief in opposition.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent International Transportation Service, Inc., Long Beach, California, its officers, agents, successors and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 18, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent also submitted a letter, dated December 2, 2004, citing recent case authority. The General Counsel, in a letter dated December 15, 2004, responded to the Respondent's cite of additional authority.

[2] Chairman Battista and Member Schaumber note that the judge relied on the Board's decision in *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966), in finding that the picket line activity was protected. Chairman Battista and Member Schaumber do not pass on the correctness of the Board's *Vila-Barr* decision. In the absence of a three-member Board majority to overrule *Vila-Barr*, Chairman Battista and Member Schaumber apply that precedent and join their colleague in affirming the judge's findings that the picketing was protected.

*Alan L. Wu, Esq.*, for the General Counsel.

*Matthew T. Miklave, Esq.*, New York, New York, and *Stephen M. Uthoff, Esq.*, Long Beach, California, for the Respondent.

*John L. Fageaux Jr.*, Long Beach, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Los Angeles, California, on June 5–6, 2003. International Longshore and Warehouse Union, Office Clerical Unit, Marine Clerks Association, Local 63 (the OCU, the Charging Party, or the Union), filed an unfair labor practice charge in this case on February 11, 2002.[1] Based on that charge, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint on February 10, 2003. The complaint alleges that International Transportation Service, Inc. (ITS), herein referred to as the Respondent, the Employer, or ITS, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Specifically, it is alleged that the Respondent discharged employee Deanna Tartaglia because she engaged in union and concerted activities. Further, it is alleged that the Respondent, through its supervisor, Lawrence L. Bear, violated the Act by informing Tartaglia of the unlawful reason for her discharge. The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices, and raising a number of affirmative defenses.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.

### FINDINGS OF FACT

#### I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a California corporation, with facilities located at 1281 Pier J Avenue, Long Beach, California, where it has been engaged in business as a container terminal operator and stevedore for ships, trains, trucks, and warehouses. Further, I find that during the 12-month period ending December 31, 2001, which period is representative of the Respondent's operations, the Respondent, in the course and conduct of its business operations, purchased and received at its Long Beach, California facilities, goods valued in excess of $50,000 directly from points located outside the State of California.

[1] All dated are in 2002 unless otherwise indicated.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

### *A. Background Facts*

The facts in this case are, for the most part, undisputed. The Respondent is located in Long Beach, California, where it operates a container terminal and moves products, goods, and materials being imported into and exported out of the United States. The Respondent's personnel are responsible for loading and unloading containers (each container holding between 20 to 30 tons) on ships, trucks, and trains for ultimate destination elsewhere. The facility operates 24 hours a day, every day of the year. The Respondent's employees process approximately 1000 containers per day, and on average between 1100 and 1600 trucks pass through the facility every day. When containers are sent via rail, the Respondent's employees load each transcontinental train with approximately 200 containers stacked two high for destinations throughout the country.

The Respondent's employees have an extensive history of collective bargaining. Since the Respondent began its operation in Long Beach, its longshoremen have been represented by the International Longshore & Warehouse Union (ILWU), Locals 13 (longshoremen), 63 (marine clerks), and 94 (walking bosses). The Respondent is a party to contracts with these three ILWU locals through its membership in the Pacific Maritime Association (PMA). On a typical day, the Respondent employees between 200 and 300 employees represented by the local unions affiliated with the ILWU.[3] Further, the Respondent's employee mechanics are represented by the International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 1484 (IAM). There are approximately 70 mechanics directly employed by the Respondent.

The OCU represents the Respondent's office clerical employees, who are directly employed by ITS. The OCU represented office clericals perform clerical and paperwork functions inside the Respondent's main administration building.[4] The Respondent negotiates contracts directly with the OCU. Laurence Bear, the Respondent's assistant vice president, has represented the Respondent in contract negotiations with the OCU for at least the period covering the last several contracts. Bear is also the person responsible for representing the Respondent in grievances filed by the OCU under the terms of the contract. The most recent collective-bargaining agreement between the Respondent and the OCU is effective by its terms from July 1, 2001, through June 30, 2004. (R. Exh. 5.)

The Respondent hired Deanna Tartaglia as its payroll and billing representative in approximately June 1999, and she remained in that position until she was terminated on February 8, 2002. During the entire period of her employment, Tartaglia was the Respondent's only payroll and billing representative. It is undisputed that since contract negotiations in 1995, the OCU has sought to expand the agreed on bargaining unit to include the position of payroll and billing representative. Apparently whenever the issue was raised, including during the most recent contract negotiations, the Respondent rejected the proposal on the basis that the payroll and billing representative was allegedly a supervisory, confidential, and/or managerial position. The recognition clause in the most recent contract excludes, among others, confidential employees and supervisors. In any event, the OCU never sought to challenge the Respondent's position by filing a contract grievance, a unit clarification petition, or a representation petition. Although the OCU raised the issue during bargaining for successive contracts, ultimately the Union agreed to sign each contract without including the payroll and billing representative in the unit.

In early 2002,[5] Steve Schwab, the OCU's vice president, telephoned Bear and asked to schedule a meeting between OCU president, John Fageaux, Schwab,[6] and Bear. A meeting was held on February 4 with the named individuals, at which time Fageaux presented Bear with a one-page letter demanding that the Respondent recognize the OCU as the exclusive bargaining representative for Deanna Tartaglia. The letter indicated that a response from ITS was expected within one (1) hour. (R. Exh. 6.) Bear expressed surprise with the turn of events, as during the most recent contract negotiations the Union had dropped the matter of representing Tartaglia's position, after initially seeking to include the position in the bargaining unit. Schwab and Fageaux indicated that Tartaglia had approached them about representation about 3 or 4 months earlier, and the Union's attorney had been working on the matter. The union representatives made it clear to Bear that the OCU was now seeking to represent Tartaglia in "a unit of one." As Bear indicated that he did not believe that a one-person unit was appropriate, the Union representatives provided him with an excerpt of a case that their attorney had furnished them to support a position that the Union could represent a unit of one. Further, they informed Bear that "time is running out," meaning that the Respondent only had 1 hour to recognize the OCU as Tartaglia's bargaining representative. Bear understood this to mean that if ITS did not recognize the OCU within the hour, that the Union would establish a picket line, effectively closing the Respondent down.[7]

Unable to reach the Respondent's counsel, Bear asked for additional time and, ultimately, the union representatives extended the job action deadline until 11 a.m. the following day, February 5. Having met with counsel by the designated time, Bear informed the union representatives that ITS would not

[3] These employees are procured through the hiring hall operated by the ILWU pursuant to its contract with the PMA.

[4] This should be distinguished from the marine clerks who perform various clerical and paperwork functions on the dock or at the gates where containers enter or leave the Respondent's premises. The marine clerks are one of the three ILWU locals that are parties to a collective-bargaining agreement with the PMA.

[5] All dates are in 2002 unless otherwise indicated.

[6] Schwab is an employee of ITS, currently on a leave of absence as provided for under the terms of the collective-bargaining agreement between the OCU and the Respondent.

[7] It was Bear's unrebutted testimony that traditionally in the stevedore industry on the West Coast, a picket line will immediately cause the union represented employees to cease work. Allegedly, the employees will continue to honor the picket line until such time as a court or arbitrator determines that the picket is improper or illegal.

recognize the Union as the representative of Tartaglia in a one-person unit. One of the OCU representatives indicated to Bear at that point that they were going to "take you out," and the representatives began telling the clerical employees that they were going out on strike.[8]

Almost immediately, the OCU established a picket line outside the Respondent's main gate. Both union representatives picketed, as did Tartaglia. While no other employee of the Respondent engaged in picketing, apparently all of the Respondent's employees who were represented by any union honored the picket line and ceased work. The pickets carried preprinted picket signs, which read either: "ITS refuses to bargain in good faith with the ILWU, Local 63, Office Clerical," or "Unfair to Labor, ILWU, International Longshoremen and Warehousemen Union."

As a result of the picketing, all work at the facility came to a halt since all ILWU and IAM locals honored the OCU picket line. Eventually the picketing caused a one-mile long line of trucks seeking to enter the ITS facility. Further, a number of trucks and a transcontinental container train already inside the facility were unable to leave. Also, two ships loaded with containers were unable to unload their cargo during the picketing. Although the picketing only lasted for 3 hours, the Respondent estimated that it cost approximately $60,000 to $90,000 in lost revenue and added expenses. Bear testified that in addition to the immediate cost in money, the picketing caused a significant loss of confidence in the Respondent among its customers, who could not understand why the Respondent was unable to move cargo at a time when the port remained open.

In a effort to have the picket line removed, the Respondent contacted the PMA, of which the Respondent is a member, and requested that the PMA arrange for an "expedited arbitration," as provided for in the contract between the PMA and the ILWU. Apparently, the Respondent believed this to constitute the most expeditious way to remove the picket. In any event, an arbitration hearing was held at approximately 2 p.m. on February 5, for the purpose of determining the propriety of the picket line. The OCU was not a party to the arbitration[9] but its officials, Fageaux and Schwab, were present for the proceeding. The unions that were parties to the arbitration were the ILWU locals whose members had honored the picket line.

At the conclusion of the proceedings, the arbitrator issued an oral award in which he ruled that the picket line was not a "bona fide" picket line and that the Respondent did not have to pay employees who had honored the picket line. Several days later, the arbitrator issued a written award. In that award, he stated the following: "The Office Clerical Unit (OCU) is attempting to expand representation beyond that recognized in any previous contract negotiation. Rather than attempting a negotiated settlement, they have used the power of the sympathetic longshore unions to attempt to force the Employer to accept their bargaining position. The picket line is deemed a collusive picket line." (R. Exh. 9.)

[8] It should be noted that the current collective-bargaining agreement between the Respondent and the OCU, which was in effect at the time in question, contains a broad "no strike" clause. See R. Exh. 5, Art. VII.

[9] The OCU was not a party to the arbitration, because it was not a party to the contract between the PMA and the ILWU.

Following the issuance of the arbitrator's oral award on February 5, Tartaglia went back to work and the picketing ceased. While the picketing had lasted about 3 hours, some of the ILWU members who had honored the picket line did not return to work until the next day. In any event, the Respondent decided to terminate Tartaglia.

On February 8, at approximately 5 p.m., Bear and Philip Feldus,[10] the Respondent's director of operations, went to Tartaglia's office. The purpose of their visit was to terminate Tartaglia. There is some dispute regarding the words Bear used when informing Tartaglia of her termination. According to Tartaglia, Bear closed the office door and told her they were there to discuss her termination. She asked why she was being terminated and Bear allegedly responded, "Well, with the stunt you pulled on Tuesday, we're still trying to figure out how many millions of dollars you cost us and you violated a confidentiality agreement." Tartaglia testified that she asked Bear to show her the confidentiality agreement, so she could see what he was referring to, but he did not. Instead, Bear is alleged to have merely responded that she discussed "things" with people. According to Tartaglia, Bear handed her a COBRA benefits package, her vacation pay, and severance pay, and told her that if she had any questions about these items to talk with Elvina Morneo, in human resources. Tartaglia claims that Bear next said that he had brought some boxes for her use, and that she should get her "shit" and leave. After gathering her belongings, Bear and Feldus escorted her out of the facility.

Bear's version of this conversation is somewhat different. He denies ever cursing in the presence of employees and specifically denies using the word "shit" in regard to Tartaglia's belongings. Further, he denies using the word "stunt." He confirmed telling Tartaglia to speak with Elvina Morneo if she had any questions about personnel matters. However, when testifying about his conversation with Tartaglia, Bear did not give a sentence-by-sentence account of what was said. Instead, he indicated that, "I basically listed those points to her." By that reference to "those points," he apparently meant a number of reasons for Tartaglia's termination, which he had given to counsel a few minutes earlier on direct examination. Those reasons included, "One, the cost, but more importantly, she was an at-will employee. She had signed our confidentiality agreement. She had obviously released that information to others outside the Company." Further, he said, "We felt that the estimated loss at that time was going to put us into a very serious problem, because we had to make up cash, and we also had to—we lost face with our customers and truckers and people like that, and she was a management supervisor person at that point in time."

[10] In its answer to the complaint, the Respondent admits the supervisory status of Laurence Bear and Philip Feldhus, but denies the agency status of both men. However, it is clear from its answer that the Respondent is really only concerned with the General Counsel's use of the term "at all material times." As the Respondent contends that it is uncertain for what specific period the General Counsel is alleging agency status, it denies that status. Since the Respondent acknowledges that Bear and Feldhus went to Tartaglia's office for the purpose of informing her that she was terminated, there can be no doubt that they were for at least that purpose acting as agents of the Respondent. Accordingly, I find that the actions and statements of Bear and Feldhus toward Tartaglia on February 8 were taken on behalf of the Respondent and in their capacity as agents of the Respondent.

According to Bear, after hearing that she was going to be terminated, Tartaglia responded by threatening, "I have an attorney and you cannot do that. . . . I'm going to sue you. I'm going to sue you tomorrow. I'm going to sue you big time." As she allegedly had an attorney and was threatening legal action, Bear contends that he decided to keep his comments brief. After watching Tartaglia gather her belongings, he and Feldus escorted her to the parking lot, from which she drove away.

Bear never testified about the specific words that he used in giving Tartaglia the reasons why she was being terminated. No written explanation was ever provided to Tartaglia for her termination. Also, it is interesting to note that the only other person present at the termination meeting, Philip Feldhus, was never called as a witness by any party.

While there are variances between the testimony of Bear and Tartaglia regarding the termination meeting, I am of the view that they are not significant. I will accept Bear's contention that he did not use the words "shit" or "stunt." He certainly seemed the type of person who, as a supervisor, would be very reluctant to curse in the presence of an employee, and I also found his statement believable that he does not use the colloquialism of "stunt." However, these are superficial matters, which have little bearing on the substantive matters discussed at the termination meeting.

I find it important that Tartaglia is able to recall in greater detail the specifics of the conversation in question. Bear testified in a rather vague and indirect way about the reasons he gave for terminating Tartaglia. It is interesting to note that he has no difficulty in recalling the precise words allegedly used by Tartaglia in threatening a law suit, but apparently cannot recall exactly what reasons he gave Tartaglia for her termination.

Overall, I am of the belief that Tartaglia's version of the conversation is more accurate than that of Bear's, so far as it concerns the reasons Bear gave Tartaglia for her termination.[11] Paramount among the reasons given was Tartaglia's participation in the picketing on February 5, which picketing had effectively shut the Respondent's facility down for 3 hours, costing the Respondent a significant amount of money and damaging its reputation among its customers. Even Bear's testimony, vague and indirect though it may be, acknowledges the "cash," the "cost," and "we lost face with our customers. . . ." While Bear indicating also giving Tartaglia other reasons for her termination including being an at-will employee, disclosing confidential information, and being a supervisor or manager, it is clear from his testimony that the principal reason he gave Tartaglia was her involvement on the picket line. Whether he used the words "picket line" or not, there was no question about the meaning of his comments. The incident that he was making reference to was obviously the picketing and the resulting damage to the Respondent. To that extent, the testimony of both Bear and Tartaglia is in agreement.

### *B. The Legal Dispute*

While the above facts are not significantly disputed, the parties differ greatly regarding certain legal issues. It is the Respondent's position that Tartaglia is not protected by the Act for a number of reasons. To begin with, the Respondent contends that Tartaglia's picketing did not constitute protected concerted activity. Allegedly, her actions were taken solely for her own benefit and not for the purpose of collective bargaining or for "mutual aid or protection." As the OCU was seeking to represent Tartaglia in a one-person unit, it is the Respondent's position that Tartaglia's picketing activity could not possibly be concerted in nature. According to the Respondent, its position is supported by the fact that the participants on the picket line consisted of the two union agents and Tartaglia. None of the other employees of the Respondent engaged in the picketing activity.

Another position taken by the Respondent flows from its contention that in picketing "to compel recognition," Tartaglia's activity was not protected by the Act. The OCU was picketing in an effort to force the Respondent to recognize the Union as the collective-bargaining representative for Tartaglia in a one-person unit. This, the Respondent had declined to do. Since the Board has long held that it will not certify a representative for bargaining purposes in a unit consisting of only one employee, the Respondent contends that any picketing for that purpose is unlawful under Section 8(b)(7)(C) of the Act. The Respondent acknowledges that the Board has found such picketing not to constitute a violation of the Act. However, the Respondent invites the Board to "reexamine" its precedent. According to the Respondent, if the picketing itself is unlawful from inception, then Tartaglia's participation in that picketing is not protected activity.

The Respondent further takes the position that Tartaglia's picketing activity was not protected by the Act, because she was not an "employee" within the meaning of the Act. According to the Respondent, during the term of her employment, Tartaglia's duties, responsibilities, and authority were such that she was a supervisor, confidential employee, and/or manager. In which event, according to the Respondent, she could be lawfully terminated for engaging in picketing activity.

It is significant to note that while Bear testified as to a number of reasons for terminating Tartaglia, including her participation on the picket line, the Respondent, in its posthearing brief, does not really contend that Tartaglia was discharged for any reason other than her picketing activity. From a careful reading of its brief, it appears to me that the Respondent has, for all practical purposes, conceded that it terminated Tartaglia because she engaged in picketing activity. Of course, the Respondent strongly argues that Tartaglia is not protected by the Act and, therefore, its termination of her was not a violation of the law.

On the other hand, the General Counsel takes the position that Tartaglia's picket line activities are fully protected by the Act. In his posthearing brief, counsel for the General Counsel argues that Tartaglia was engaged in "union activity" in seeking to be represented for bargaining purposes by the OCU. It is counsel's position that union activity is, by its very nature, always collective activity. Therefore, the fact that the Union was seeking to represent a one-person unit, and that no other employees participated in the picketing, does not detract from the collective nature of Tartaglia's representational/union activity.

Further, the General Counsel argues that the Respondent should not be able to raise a Section 8(b)(7)(C) defense in this case by, in effect, charging the Union with an unfair labor prac-

[11] In resolving this issue, I do not believe that it is necessary at this time to determine the relative credibility of Bear or Tartaglia. I will be addressing their credibility at length later in this decision.

tice. Counsel points out that the Respondent previously filed no such charge against the OCU,[12] and, in any event, any such charge would allegedly not affect Tartaglia's Section 7 right to picket the Respondent in an effort to secure representation. She is a separate entity from the Union, and the Union's actions cannot negate her rights under the Act. In any event, it is the General Counsel's position that the Board law is settled, and that it is clear that a union does not violate Section 8(b)(7)(C) of the Act by picketing for recognition in a one-person unit. Not withstanding the Respondent's invitation to the Board to "reexamine" its precedent, the General Counsel argues that the issue is presently well settled, and, of course, an administrative law judge must adhere to Board precedent.

Regarding her employment status, the General Counsel contends that Tartaglia was an "employee" as defined in the Act. Counsel disputes the Respondent's contention that Tartaglia was either a supervisor or manager. Further, counsel for the General Counsel takes the position that even assuming, for argument sake, that Tartaglia was a confidential employee, such a person does not lose the protection of the Act when she engages in protected concerted activity, like picketing.

Finally, counsel for the General Counsel contends that he has met his evidentiary burden and established that the Respondent discharged Tartaglia because she engaged in union activity. He contends that the Respondent has basically conceded that it discharged Tartaglia because of her activity on the picket line. However, counsel argues that to the extent the Respondent offers additional reasons for Tartaglia's termination, the Respondent has failed to meet its evidentiary burden to establish that it would have discharged her even in the absence of her union activity.

### *C. Tartaglia's "Employee Status"*

The Respondent has alleged at various times that Tartaglia was either a supervisor, confidential employee, and/or managerial employee and, thus, not protected by the Act. According to the General Counsel, Tartaglia was an "employee" as defined in the Act and, accordingly, entitled to the protection of the Act. It is, therefore, necessary for the undersigned to determine Tartaglia's employee status. In doing so, I will note that I did not find Tartaglia to be a particularly credible witness. I believe that to some extent she exaggerated and embellished her testimony to put her cause in the best possible light. Further, on cross-examination, she was less than cooperative, often appearing hostile and argumentative. It was obvious from her testimony that she had embellished her resume in order to secure employment with the Respondent, and also that she had exaggerated her job duties and responsibilities at ITS in her yearly self-evaluations. While this may be considered merely "puffing," and not of great consequence, more serious is the Respondent's allegation that Tartaglia arranged payment for her brother for work which he did not perform.[13] Evidence was offered at the hearing to suggest that on at least one occasion, Tartaglia altered the payroll records to provide for payment to her brother for work performed on a date on which he was not present at the Respondent's facility. While Tartaglia denied any knowledge of, or involvement in, this matter, I found her denials less than persuasive.

However, a witness who is generally incredible may still be found credible for the purpose of resolving certain specific disputed issues. While I found Tartaglia's testimony incredible as to certain matters, I did, for the most part, believe her testimony regarding her job duties and responsibilities. This testimony was consistent with the other evidence offered, and was inherently probable. If anything, she tended to over emphasize her own importance, as was reflected in her yearly self-evaluations. Tartaglia's testimony, in combination with other evidence offered, convinces me that during the term of her employment with the Respondent, and specifically at the time of the events in question, she was an "employee" as defined in the Act.

During the 3 years of her employment with the Respondent, Tartaglia was classified as the payroll and billing representative. She was the only person in this classification during the term of her employment. From the start of her employment in June 1999, until approximately September 2001, Tartaglia reported directly to Michael Shanks, the Respondent's vice president of corporate planning. Thereafter, until her termination on February 8, 2002, she reported to Brent Kitagawa, whose immediate supervisor was Philip Feldhus, director of operations. Tartaglia's principal duty was to process payroll. She testified that each morning she collected the "payroll logs" from the previous day. The payroll log, also known as the "Report Of Time Worked," is a standardized form used by the Pacific Maritime Association (PMA). The log indicates the operation worked, the shift, the company, and the registration number or social security number of the worker who worked at the specific job. (As an example, see R. Exh. 10.) The log also contains the start and stop times of the employees named in the log. The log generally contained a superintendent's signature, and Tartaglia was required to give them to Feldhus for his signature. She could not process payroll if the log did not have a superintendent or Feldus' signature on it. Following the receipt of the signatures, Tartaglia inputted the data into the payroll system software, which was named Microsoft Fox Pro.

Her duties also entailed attempting to resolve payroll disputes. With some frequency, she would be contacted by employees claiming that they had been shorted on the payroll. Tartaglia testified without contradiction that on those occasions she would investigate the claim by reviewing the payroll logs and the dispatch tickets from whichever union hiring hall had dispatched employees for the job involved. She might confer with marine operations as to the number of employees they had requested be dispatched, with the union dispatch hall, and with the foreman on the particular job to determine whether the foreman had inadvertently left a name off the log. In this way she was able to resolve most disputes and determine whether a complaining individual should be paid as he was alleging. In those cases where she determined that a complaining individual should be paid, Tartaglia was authorized to input the increase directly into the payroll software, Microsoft Fox Pro, apparently without additional paperwork.

Of course, situations also developed where the wrong worker had been paid. Again, Tartaglia would conduct an investigation

[12] No evidence or representation was offered at the hearing to suggest that the Respondent had ever filed with the Board an unfair labor practice charge against the OCU alleging the picketing on February 5 as a violation of Sec. 8(b)(7)(C) of the Act.

[13] The evidence established that Dean Tartaglia is Deanna Tartaglia's brother, and that he is employed as a marine clerk who, on occasion, has been referred through the Longshore Union hiring hall to work at the Respondent's facility.

by reviewing the payroll logs, dispatch tickets, and consulting with marine operations and the union hall to determine which individuals had worked, for what period of time, and on what particular job. To make a correction to a worker's payroll, she had to decrease the wrongly paid worker's payroll and concurrently increase the payroll of the correct worker. In order to do this, she had to submit paperwork on a "decrease sheet," which is a PMA form. She was authorized to so, and was required to sign the decrease sheet.

Additionally, Tartaglia had also been authorized to adjust the start time for a worker that the union hall dispatched to the Respondent when the worker's start time on the payroll log was too close in time to his dispatch from the hall, making it impossible that the worker could have traveled the distance from the union hall to the Respondent's facility in that short a period of time. According to Tartaglia, her job was to ensure that the payroll was correct and that ITS did not incur expenses unnecessarily. This was her unrebutted testimony and was reflected in her yearly self-evaluations, although as I have noted, I found those evaluations to contain a certain amount of "puffing." (GC Exh. 4–6.) It is clear to me that Tartaglia had a somewhat inflated opinion of her job duties and responsibilities, and she was in the habit of making herself seem more important than she really was.

In any event, it should be noted that in processing payroll, Tartaglia was required to utilize a "payroll code sheet," which consists of job codes issued by the PMA. The code sheet distinguishes between the various categories of employees employed by PMA members, and the base pay for each category. It is clear that Tartaglia had no authority to deviate from the payroll code sheet on her own in processing payroll for the Respondent. However, she testified about one instance where Feldus and another manager instructed her to alter the pay of an employee in order to give him extra compensation. According to Tartaglia, she never decided on her own to give an employee extra compensation because he was well liked or a good worker. It is undisputed that management had never given Tartaglia any such authority, although as noted above, there is some evidence that she exceeded her authority and may have given her brother credit for a job that he did not work.

Another significant function performed by Tartaglia was preparing the "Vessel Activity Report" (VAR), which determined the amount of money the Respondent billed its customers. The VAR contains information showing the number of containers that were loaded and unloaded, itemized by shipping company lines. It also contains the vessel name, voyage, the time it spent at the Respondent's facility, and any standby time. According to Tartaglia's unchallenged testimony, she completed the VAR by copying information onto the VAR from several other reports. The raw information was then used by Microsoft Excel to calculate the total moves necessary to load or unload the containers. In transferring information from various forms onto the VAR, Tartaglia did not alter the information in any way. After the information has been recorded on the VAR, Tartaglia was required to have it, and several other forms, reviewed and initialed by manager Eric Porter. Porter, or some other manager, would either correct any errors on the VAR himself, or instruct Tartaglia to do so.

As noted earlier, the Respondent takes the position that Tartaglia was a supervisor. The term "supervisor" is defined in Section 2(11) of the Act as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the enumerated functions in Section 2(11) are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance, is sufficient to confer supervisory status. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Queen Mary*, 317 NLRB 1303 (1995); and *Allen Services Co.*, 314 NLRB 1060 (1994). However, in my opinion, Tartaglia did not exercise any of the indicia of supervisory authority listed above. There were simply no employees working under her direction, and she did not have the authority to interact with employees in the way contemplated in Section 2(11) of the Act. While she reviewed employee complaints concerning alleged shortages in pay, this was merely a clerical function. Her investigation was limited to determining whether the employee had worked or not, based on a review of the documentation and conversations with the employee, marine operation, the hiring hall, and any foreman involved. Any employee who did not agree with Tartaglia's determination could file a grievance under the terms of the applicable collective-bargaining agreement, in which process Tartaglia had no involvement. Further, while she had been authorized to adjust employee starting time to reflect travel time following dispatch, this was a routine calculation made pursuant to the Respondent's outstanding instructions. Again, any grievance filled over this adjustment would not involve Tartaglia.

The determining factor as to whether an individual is a supervisor is the exercise of "independent judgment." The Board and the courts look to see if the authority exercised is set forth in detailed orders or regulations issued by the employer or is truly independent. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), citing with approval *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). In the matter before me, the evidence establishes that Tartaglia's payroll decisions merely required her to follow the Respondent's well established policies. Her investigation of complaints was routine in nature and did not require the exercise of independent judgment. She was responsible to ensure that the payroll was as accurate as possible, and whether an employee was to be paid or not was totally dependent on whether the individual worked the hours claimed. If her investigation established that the hours were worked, the employee was paid, otherwise he was not. Such decision-making did not require Tartaglia to exercise true independent judgment.

In fact, I am of the opinion that all of Tartaglia's payroll and billing duties were both clerical and routine in nature, not directly involving the supervision of any other employees.[14] The

[14] Toward the end of 2001, Tartaglia was instructed by Feldus to train a superintendent named Stanley Sudoko in the performance of her job in the event she was absent from work. Sudoko continued with his superintendent duties, and it seems very clear that while instructed to train him in the payroll and billing responsibility, Tartaglia did not have

Respondent as much as acknowledges in its posthearing brief that Tartaglia did not exercise any of the indicia of supervisory authority found in Section 2(11) of the Act when it argues instead that Tartaglia exhibited certain "secondary factors," which the Board has considered in determining supervisory status. Allegedly, the Respondent held Tartaglia out to employees and members of the public as a supervisor by, among other means, providing her with her own office, giving her an "R-key," which gave her access to most of the offices in the administration building, and by providing her with an identification badge identifying her as a member of management. However, in my view, these are merely superficial, cosmetic matters, which certainly did not alone confer any supervisory authority on Tartaglia. These "trappings" are, without any direct indicia of supervisory authority, totally inadequate to establish supervisory status.

It is important to recall that as the payroll and billing representative, Tartaglia was "one of a kind." She dealt on a daily basis with privileged information, such as the earnings of employees and the amounts the Respondent was billing customers. In these circumstances, it would seem to be in the Respondent's interest to provide Tartaglia with a private office. Having done so does not demonstrate that she held a position identified with management or as a supervisor. Tartaglia was an hourly paid employee. By agreement with the Employer, Tartaglia was paid for eight hours a day straight time, and for one hour a day overtime. However, from her testimony it appears that this was a fairly flexible arrangement, which permitted Tartaglia to occasionally come to work some what late or leave some what early, as long as she made up the time another day. Similarly, it appears that she was able to take a short time off during the workday for personal business without getting prior permission, so long as she made up the time at a later date. More extended time off required prior permission from management. This informal, flexible arrangement was not surprising or unusual considering that Tartaglia was the only employee performing her specific duties, and that she worked in the administration building in close proximity with her immediate supervisors. Such an arrangement certainly does not demonstrate that she was a supervisor.

It is the Respondent's burden to establish that Tartaglia was a supervisor within the meaning of the Act. The Board has long held that the burden of establishing that an individual is a statutory supervisor without the protection of Section 7 is to be borne by the party asserting such status. The Supreme Court approved the Board's evidentiary allocation in its recent paramount decision on the subject of supervisory status in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001). Based on the credible evidence presented, I conclude that the Respondent has failed to meet this burden. Tartaglia was not a supervisor as defined in the Act.

In the alternative, the Respondent alleges that Tartaglia was a managerial employee. Although the Act makes no specific provision for "managerial employees," the Board has traditionally excluded this category of worker from the protection of the Act. See *Ford Motor Co.*, 66 NLRB 1317 (1946); *Palace Dry Cleaning Corp*, 75 NLRB 320 (1948). Managerial employees are excluded from coverage under the Act because their functions and interests are more closely aligned with management than with unit employees. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974). In *General Dynamics Corp.*, 213 NLRB 851, 857 (1974), the Board defined managerial employees as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." Also see *Bell Aerospace Co.*, at 288. The managerial exception was further defined by the Supreme Court in *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682–683 (1980), which held that, "[m]anagerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." Further, the Court said that in order to constitute a managerial employee, a worker must represent management interests by taking actions that "effectively control or implement employer policy."

In arguing that Tartaglia was a managerial employee, the Respondent uses many of the same examples relied on in its attempt to establish supervisory status. However, these arguments continue to fail for the same reasons I previously expressed. Regarding Tartaglia's ability to adjust payroll, it is worth noting that the Respondent, in its post-hearing brief, mentions the total amount of adjustment as $500,000 in payroll increases. Such a large sum, the Respondent contends, demonstrates that she was a managerial employee. In my view, the amount of money involved does not alter the fact that for each individual employee involved, Tartaglia made a routine decision based on the Respondent's established policies. Again, all she had to determine was whether the employee had worked the hours claimed, in which event he was to be paid. Over the term of her employment, many employees had such disputes regarding their pay, and Tartaglia handled each in essentially the same routine manner. There was no exercise of true discretion either inside or outside of the Respondent's established policies.

The Respondent offers several additional examples of Tartaglia's conduct, which it contends demonstrates managerial authority. Tartaglia was from time to time directed by her supervisor to attend, as the Respondent's only representative, meetings of PMA members. However, Tartaglia's unrebutted testimony was that these meetings she was assigned to attend were nothing more than seminars designed to educate the individual members about changes PMA was making in its payroll system, computer programs, or standard forms. Since she was the Respondent's payroll and billing representative, it was certainly logical that she would attend such meetings. It is significant that Tartaglia's uncontested testimony was that these PMA meetings had nothing to do with collective-bargaining issues, and that she never attended any "management meetings" with the Respondent's managers and supervisors. There was simply no evidence offered as would established that Tartaglia was in some way "aligned" with management.

The second example raised by the Respondent concerned modifications made to its payroll software program. The Respondent employed an outside contractor to make modifications to the program, and also to correct flaws that developed from time to time in the operation of the program. Only Tartaglia and her supervisor, Mike Shanks, had the authority to order modifications to the software program and to contract with the Respondent's outside contractor for those modifications. According to the Respondent, Shanks and Tartaglia authorized

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the authority to, nor did she, exercise any supervisory responsibility over Sudoko.

modifications to the program, which cost the Respondent in excess of $23,000 in payments to the contractor. (R. Exh. 15.) However, in my opinion, this certainly does not establish managerial authority. As the payroll and billing representative, Tartaglia was the person most familiar with the payroll software program and any changes the PMA was making to the program. That was the principal reason why she attended the PMA meetings. Who better than Tartaglia to authorize the private contractor to perform modifications on the program or to correct its flaws? She worked with the program every day, and was the person most familiar with it. Tartaglia's authorization of the expenditure of funds for work on the program was not independent of established employer policy. Rather, it was routine operating procedure under the Respondent's established policy to allow its payroll and billing representative to authorize work on its software program.

I believe that the record is very clear that Tartaglia was not a managerial employee. Apparently the Respondent's supervisors were equally certain, as in her last two employee evaluations, references were made that she was not a manager. In Tartaglia's 2000 evaluation, Mike Shanks wrote under "Management Skills" at page 4, "NOT APPLICABLE AT THIS TIME." (G.C. Exh. 5.) Similarly, in Tartaglia's 2001 evaluation, her last supervisor, Brent Kitagawa, wrote under "Management Skills" at page 5, "N/A." (G.C. Exh. 6.) In my view, nobody was better able to evaluate any managerial duties possessed by Tartaglia than her immediate supervisors. Obviously, as far as they were concerned, she exercised no managerial authority.

I am convinced that regardless of her title, Tartaglia functioned primarily as a "timekeeper," or "payroll clerk." The Board has held that timekeepers are not managerial employees. In *Holly Sugar Corp.* 193 NLRB 1024 (1971) the Board determined the status of employees whose duties were in many respects similar to those of Tartaglia. The employee timekeepers in that case prepared raw data for the company payroll using foremen's time records and employee time cards. They consulted with company managers on an "as needed" basis, but they did not resolve formal "grievances" over rates of pay. In finding these employees not to be managers, the Board held that, "[w]hile it is true that the timekeepers make some decisions and exercise some judgments, they do so only within established limits set by higher management." Further, the Board held that, "[t]hey play no part in the formulation or effectuation of the Employer's policies." As in that case, I conclude that Tartaglia was not a managerial employee. (Also see *Hansen Co.*, 293 NLRB 63, 64 (1989), in which the Board found the signing of time cards to be routine or clerical in nature.)

In its posthearing brief, the Respondent no longer argues that, in the alternative, Tartaglia was a confidential employee. However, I will address this issue as the Respondent had previously taken this position. The reason why the Respondent is no longer taking this position may be because, on reflection, the Respondent would be forced to acknowledge that confidential employees are protected by the Act. In *Peavey Co.*, 249 NLRB 853, fn. 3 (1980), the Board agreed with an administrative law judge that an employer violated the Act by informing a confidential employee that she should not engage in union activity. In comparing confidential employees to supervisors, the Board said, "[c]onfidentials have a much different status in that employers are not entitled to restrict their protected activities." Further, the Board held that, "whether or not Respondent honestly viewed [the discriminatee] as a confidential employee is of no moment here since [the discriminatee] was entitled to engage in such activities even if she were a confidential." (Case citations omitted)

Traditionally, the Board has used a "labor nexus test" to determine whether a worker is a confidential employee. In *BF Goodrich Co.*, 115 NLRB 722, 724 (1956), the Board held that, "…only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" constitute confidential employees. Under Board policy, confidential employees are excluded from a bargaining unit with other employees. See *Ladish Co.*, 178 NLRB 90 (1969). However, as noted above, they still enjoy the protection of the Act.

Tartaglia was not a confidential employee under the Board's "labor nexus test." There was no evidence offered as would establish that she acted in a confidential capacity to persons who formulated, determined, and effectuated management policies in the field of labor relations. Laurence Bear testified that he was the person responsible for representing management in contract negotiations with the OCU, and also for processing grievances filed by the Union under the terms of the collective-bargaining agreement. The human resources department reported directly to Bear. However, Tartaglia's duties were totally unrelated to collective-bargaining issues, or to processing grievances under the terms of any of the collective-bargaining agreements to which the Respondent was a party. Further, Tartaglia did not report directly to either Bear or the human resource department (HR), and there was no evidence offered that she had any direct work related interaction with either Bear or HR. Accordingly, I conclude that Tartaglia was not a confidential employee, although as noted, even assuming such a status, she enjoyed the Act's protection.

As is apparent from the above, I have concluded that during the term of her employment with the Respondent, Tartaglia was an "employee" as defined in the Act. Regardless of her title as the payroll and billing "representative," the evidence demonstrates that she was really a "clerk," responsible for certain specific payroll and billing functions, much as would be a "timekeeper," or "payroll clerk." It is interesting to note that on at least one occasion during the hearing, Lawrence Bear, the highest official of the Respondent to testify, referred to Tartaglia's position as the payroll and billing "clerk."[15] This "slip of the tongue" by Bear was not surprising in view of the fact that, in my opinion, Tartaglia's duties appeared largely clerical or ministerial in nature. Apparently, Bear viewed her in the same light. In any event, I find that Tartaglia, as an "employee," was entitled to the protection of the Act.

*D. The Picketing Constituted Protected Concerted Activity*

There is no dispute that the OCU picketed the Respondent's facility on February 5 in an effort to force the Respondent to recognize the Union as the collective-bargaining representative of Deanna Tartaglia in a one-person unit. The picketing lasted for approximately 3 hours, during which the only persons who actually engaged in picketing were Tartaglia and two union officials. However, numerous employees honored the picket

[15] See Tr. p. 208, LL. 3–5.

line and the Respondent was effectively shut down for that period of time.

It is the Respondent's position that since Tartaglia was the only employee actually picketing, and because the Union was seeking to represent only her, that her actions were not concerted as they were intended to benefit only Tartaglia. According to the Respondent, this was sole activity, unprotected by the Act, for which she could be fired. However, current Board law holds to the contrary.

As early as 1936, the Board concluded that while the Act does not permit the certification of a single employee unit, a single employee may still designate a representative to act for him. The Board held that, "the Act in no way limits that right . . . in no way limits the protection which the Act otherwise gives such an employee." *Luckenbach Steamship Co.*, 2 NLRB 181 (1936). More recently in *Electrical Workers, Local Union No. 596 (Lylloth G. Woodall)*, 274 NLRB 1348 (1985), the Board continued to hold that a single employee engaged in union activity is protected by the Act, stating as follows:

> [A]ny absence of "concertedness" in [the discriminatee's] conduct that might be inferred from her status as a sole employee in the bargaining unit does not remove her union activity from the protection of the Act. For where union activity is involved, the protection afforded by Section 7 is absolute and not contingent on a showing that the victim of coercion had made or intended to make common cause with other employees.

The Board obviously considers any union activity to be concerted in nature, even where only a single employee is involved. In a recent case the Board continued to take this position, reversing an administrative law judge who "failed to recognize that Section 7 defines both joining and assisting labor organizations—actions in which a single employee can engage—as concerted activities. . . . Accordingly, by definition, [the discriminatee's] conduct was concerted without regard to the fact that he may have acted alone." (Internal quotations omitted.) *C.S. Telecom, Inc.*, 336 NLRB 1193 (2001), citing and quoting *NLRB v. City Disposal Systerms*, 465 U.S. 822, 831 (1984).

Even closer to the issue before the undersigned is *Mauka, Inc.*, 327 NLRB 803, 804 fn. 8 (1999), in which the Board reversed an administrative law judge's finding that the discriminatee was not an unfair labor practice striker because he acted alone in the strike. The Board held that "[b]ecause [the discriminatee] was engaged in union activity, it is irrelevant that no other employee joined him in striking." Also see *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40 (1986) (citing the Supreme Court's decision in *NLRB v. City Disposal Systems*, supra.); and *Manno Electric*, 321 NLRB 278, 281 (1996). Clearly, the Board has consistently taken the position that an employee acting alone and engaging in union activity is protected by the Act. Tartaglia was such an employee when she participated in picketing activity outside the Respondent's facility in order to force the Respondent to recognize the OCU as her bargaining representative.

It is the Respondent's position that in picketing for a one-person unit, which unit the Board could not certify, the Union was in violation of Section 8(b)(7)(C) of the Act. According to the Respondent, it therefore follows that Tartaglia's action in picketing in support of the Union's unlawful conduct could not be protected under the Act. In support of this position, the Respondent relies on a decision of the Seventh Circuit Court of Appeals, which held that absent the possibility of a Board election in a mixed guard and nonguard unit, recognitional picketing appeared to be proscribed by Section 8(b)(7)(C) of the Act. *International Brotherhood of Teamsters Local 344 v. NLRB and Purolator Security, Inc.*, 568 F.2d 12 (7th Cir. (1977). In the view of the Respondent, this situation is analogous to a union picketing for recognitional purposes in a one-person unit.

However, the Board has clearly chosen not to follow the Seventh Circuit's rational in *Purolator Security*, as it relates to one-person conduct. The Board has continued to adhere to the one-person policy first enunciated in *Lickenbach Steamship*, supra in subsequent decisions. See *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966); *Plumbers Local No. 195 (Neches Instruments Service)*, 221 NLRB 1226 (1975); *American Radio Assn. (Watters Marine, Inc.)*, 258 NLRB 1251 (1981); and *Electrical Workers, Local Union No. 596 (Lylloth G. Woodall)*, 274 NLRB 1348 (1985). It is significant to note that the Board's decision in *Lylloth G. Woodall* postdates the decision of the Seventh Circuit by 8 years.

While the matter before the undersigned is obviously not an 8(b)(7)(C) case against the Union, the Respondent continues to suggest that the OCU's picketing on February 5 was a violation of that Section of the Act. It is, therefore, worth noting that apparently no such charge was ever filed by the Respondent against the Union. Further, Tartaglia was not the Union. She was merely an individual employee of the Respondent who sought to assist the Union's picketing efforts, which efforts were intended to force the Respondent to recognize the Union as her collective-bargaining representative. There has certainly been no finding of improper conduct on the part of the Union. However, even assuming, for argument sake, some improper conduct by the Union, such conduct cannot be imputed to Tartaglia. She is not a representative or agent of the Union.

Section 8(b)(7)(C) of the Act prohibits a labor organization from engaging in recognitional picketing without filing a petition for an election with the Board within a reasonable period of time, not to exceed 30 days. It is the Respondent's position that as the Board will not conduct an election in a one-person unit, or certify such a unit, that any picketing for recognition in a one-person unit is a violation of the Act from the inception of the picketing. This position is allegedly supported by *Purolator Security, Inc.*, supra. However, as I have already noted, the Board has specifically chosen not to follow the Seventh Circuit case, as it relates to a one-person unit, or one-person conduct.

In *Vila-Barr*, supra, the Board was squarely faced with the issue of whether a union can violate Section 8(b)(7)(C) of the Act in the context of picketing for recognition in a one-person unit. The Board specifically held that where a one-person unit was involved, a union claiming recognition was "disabled through no fault of its own from invoking the Board's election processes for purposes of resolving the question concerning representation raised by its picketing." Under these circumstances, the Board decided that it would be "inequitable" to conclude that the union had violated Section 8(b)(7)(C) by picketing for recognitional purposes without filing a petition within a reasonable period of time. The Board found there to be no violation of the Act.

The Board continued to follow the holding in *Vila-Barr*, even after the Seventh Circuit's decision. In *American Radio Assn. (Watters Marine, Inc.)*, 258 NLRB 1251, 1257 (1981), which

postdates the Seventh Circuit's case by 4 years, the Board affirmed an administrative law judge who found that the single employee involved was still protected by the Act, regardless of the fact that the Board would neither certify a one-person unit, nor find an 8(b)(7)(A) violation of the Act. The judge stressed the similarities between Sections 8(b)(7)(A), (B), and (C) of the Act, and indicated that the single employee involved in the case did not lose the protection which the Act otherwise gives such an employee who engages in union activity. Also see *Neches Instruments Service*, supra, at 1227; and *Lylloth G. Woodall*, supra, at 1351 which postdates the Seventh Circuit's case by 8 years.

The Respondent "invites" the Board to change its position, and follow the Seventh Circuit's rational in *Purilator Security, Inc.*, supra. The Board, of course, can do so if it decides on reflection that the Seventh Circuit's rational is more in conformity with the Act, and the intention of Congress, than the Board decisions cited above. This is the province of the Board, not an administrative law judge. The undersigned is required to follow Board precedent, which I intend to do. I find that current Board law is clear. Tartaglia's picketing activity on February 5 was lawful and protected under *Vila-Barr*. She was a separate entity from the Union, however, under Board law as it presently exists, the Union's picketing of the Respondent for recognitional purposes in a single person unit would not constitute a violation of Section 8(b)(7)(C) of the Act. *Vila-Barr*. Further, I am of the belief that even assuming, for the sake of argument, that the Union's conduct was for some reason unlawful, it would not negate Tartaglia's right to picket. In peacefully picketing for recognitional purposes, she was certainly engaged in the most basic form of union activity. The Board has held that "where union activity is involved, the protection afforded by Section 7 is absolute. . . ." *Lylloth G. Woodall*, 274 NLRB at 1351. Therefore, Tartaglia's picketing activity on February 5 was protected activity under the Act.

### *E. Bear's Statement to Tartaglia on February 8*

As noted earlier in the facts section of this decision, there is some dispute between Tartaglia and Bear as to the specific words used by Bear when on February 8 he informed Tartaglia that she was being terminated. For the reasons I previously expressed, I found Tartaglia's version of this conversation, which was more specific than Bear's, to overall be more credible. While Bear apparently expressed a number of reasons for the termination, including cost and the alleged release of confidential information, it is clear from Tartaglia's testimony that the principal reason given by Bear was her participation in the picketing on February 5. Even from Bear's version, vague and indirect though his testimony may be, it is obvious that other reasons allegedly offered for the termination, such as cost, loss of customers, release of confidential information, and disloyalty as a manager, all resulted directly from Tartaglia's picketing activity. Semantics aside, it is beyond doubt that both Tartaglia and Bear understood that the reason the Respondent was upset with Tartaglia was because she had engaged in picketing, which had set in motion a chain of events that had cost the Respondent a large sum of money and loss of reputation with its customers. This was the reason she was being fired. Whether Bear spoke the words he alleges, or those words Tartaglia alleges, or a combination of the two, I am convinced that the words spoken by Bear made it clear to Tartaglia that the principal reason for her termination was because she had engaged in picketing activity.

Regardless of the precise words used by Bear, his statement to Tartaglia during her termination meeting on February 8 was tantamount to telling her that she was being discharged for engaging in picketing activity with the Union. Such a statement would tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. See *Arakelian Enterprises, Inc.*, 315 NLRB 47, 62 (1994). As noted earlier, I have concluded that Tartaglia was an employee as defined by the Act. However, even if at the time of her termination the Respondent had a good faith belief that Tartaglia was a supervisor, manager, or confidential employee, it would not change the coercive nature of Bear's statement to Tartaglia. The Board has held that "[a]n employer acts at its peril" when it takes action designed to chill the exercise of Section 7 rights "by individuals who may later be found to be under the protection of the Act." *Shelby Memorial Home*, 305 NLRB 910 fn. 2 (1991).

Accordingly, based on the above, I conclude that the Respondent, through Lawrence L. Bear, violated Section 8(a)(1) of the Act on February 8, as alleged in paragraphs 7 and 9 of the complaint.

### *F. The Discharge of Tartaglia*

I believe that for all practical purposes, the Respondent has admitted that it discharged Tartaglia on February 8 because she engaged in picketing activity with the Union on February 5. However, to the extent that the Respondent, through Bear, offers alternative reasons for her termination, I will address the parties' respective burdens as established in Board law.

Section 7 of the Act gives employees the right to engage in "self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." It is axiomatic that an employee who assists a union in peacefully picketing her employer to require that employer to recognize the union as her collective-bargaining representative is engaged in Section 7 activity. I have already found that Tartaglia was such an employee. Termination of an employee for engaging in picketing activities violates Section 8(a)(1) and (3) of the Act. *Gasko & Meyer, Inc.*, 255 NLRB 658 (1981).

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Tartaglia's picketing activity was a motivating factor in the Respondent's decision to terminate her. Lawrence Bear admitted that Tartaglia's picket line involvement was, at a minimum, a motivating factor in the Respondent's discharge of her. In *Tracker Marine*, 337 NLRB

644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. See also *Kysor Industrial Corp.*, 309 NLRB 237 (1992). To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See also *Mano Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); and *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

As I indicated above, there is no doubt that under current Board law, Tartarglia was engaged in union activity protected by the Act when she picketed the Respondent on February 5. Of course, the facts establish that the Respondent was well aware of this activity. Throughout the course of the day on February 5, the Respondent was preoccupied with attempting, through an expedited arbitration, to have the picketing declared not bona fide under the terms of the contract between the PMA and the ILWU, and to have the employees who had honored the picket line return to work. The Respondent was obviously fully aware of the integral part Tartaglia had played in the picketing. After all, without her interest in being represented by the OCU and her willingness to engage in picketing, there would have been no picket line established, and the Respondent's operation would not have been shut down for the better part of the day on February 5. Bear indicated as much to Tartaglia when he terminated her three days later, telling her, among other things, that she had cost the Respondent a large sum of money and damaged its reputation. Knowledge of Tartaglia's picketing activity cannot possibly be in dispute.

There is also no doubt that Tartaglia sustained an adverse employment action. The Respondent discharged her on February 8 from the job that she had held for approximately 3 years as payroll and billing representative.

Regarding the question of whether there exists a link or nexus between Tartaglia's protected activity and her termination, I have already indicated that there was such a connection. I have found that Bear informed Tartaglia that she was being terminated because of her actions three days earlier in participating in the picket line established by the OCU to force the Respondent to recognize the Union as her bargaining representative. This statement by Bear has been found by the undersigned to constitute a violation of Section 8(a)(1) of the Act.

In addition to the direct evidence of the Respondent's animus exhibited by Bear in his termination statement to Tartaglia, there is also the matter of "timing." It is self evident that the discharge, which occurred only 3 days following Tartaglia's picketing activity, was directly related to that activity. The Board has held that timing may be "persuasive evidence" establishing unlawful motivation. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Also see *Laidlaw Transit, Inc.*, 315 NLRB 79, 84 (1994). I am of the view that animus toward Tartaglia because of her picketing activity can really not, in good faith, be denied by the Respondent.

The General Counsel, having met the burden of establishing that the Respondent's actions were motivated, at least in part, by animus toward Tartaglia's protected activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

As I have said a number of times, I believe that for all practical purposes, the Respondent has admitted discharging Tartaglia because she engaged in picketing activity in conjunction with the Union in an effort to force the Respondent to recognize the Union as her bargaining representative. However, to the extent that the Respondent may be offering alternative reasons for her discharge, I will address certain other reasons given by Bear for discharging Tartaglia. According to Bear's testimony, the reasons for Tartaglia's termination included the monetary cost to the Respondent resulting from having its operation shut down, the damage to its reputation among its customers, Tartaglia's alleged status as a managerial employee, and her alleged disclosure of confidential information.

Regarding the monetary cost and damage to its reputation, it is obvious that these matters were a direct result of the strike and picketing. As I have already concluded that Tartaglia's support for these actions constituted protected union activity, the Respondent could not legitimately discharge her for the consequences resulting from that protected activity. Undoubtedly, the Respondent was upset with Tartaglia because her picketing and strike activity had cost the Respondent a lot of money and loss of "face" with its customers. However, the Respondent could no more lawfully fire her for these reasons than it could have because she engaged in the strike and picketing, which caused the Respondent financial loss and damage to its reputation.

Bear's other stated reasons for discharging Tartaglia, namely because she was a managerial employee who disclosed confidential information, are also invalid. Bear used the term "at will employee" to explain his belief that as an alleged managerial employee, Tartaglia could be terminated for perceived disloyalty. However, as I have noted at length above, Tartaglia was not a supervisor, manager or confidential employee. Rather, she was an employee as defined by the Act. Even assuming, for argument sake, that she was a confidential employee, which classification of employee is protected by the Act, Tartaglia could not lawfully be fired for engaging in union or protected concerted activity. Further, Bear's contention that Tartaglia released confidential information is totally unsupported by the evidence. As a matter of fact, no evidence what so ever was offered by the Respondent to establish that some unspecified confidential information was ever released by Tartaglia to some unspecified recipient. Apparently, Bear just assumed this to have happened, and the Respondent made no effort at the hearing to support this assumption.

Based on the above, I am of the belief that to the extent that Bear offers reasons other than Tartaglia's strike and picketing activity for her termination, those other reasons are merely a pretext. They appear meritless. Accordingly, I conclude the

Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because Tartaglia engaged in union and protected concerted activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

In summary, I find and conclude that the General Counsel has established a prima facie case, and that the Respondent has failed to rebut that evidence. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Deanna Tartaglia as alleged in paragraphs 6(a) and (b), and 8 of the complaint.

### *G. Posthearing Motions*

Following the hearing in this case, the parties filed a number of motions with the undersigned. Dated July 21, 2003, the Respondent filed a motion to reopen the record, with attachments, and a motion to correct the record. Pursuant to my issuance of an Order to Show Cause dated July 24, 2003, counsel for the General Counsel filed an opposition to Respondent's motion to reopen record dated August 4, 2003. This was followed by the Respondent's reply memo in support of motion to reopen the record dated August 13, 2003, and then by counsel for the General Counsel's motion to strike Respondent's reply memo in support of motion to reopen the record dated August 21, 2003. I have reviewed and considered each of the above-mentioned motions.

In its motion to reopen the record, the Respondent seeks to reopen the record pursuant to Section 102.35(a)(8) of the Board's Rules and Regulations for the purpose of allegedly presenting "recently discovered evidence." According to counsel for the Respondent, ITS has uncovered evidence as would show that Deanna Tartaglia defrauded the Respondent by paying employees who did not perform services for the Respondent. Counsel alleges that on "at least 38 separate occasions between December 1999 and January 2002," Tartaglia engaged in this fraudulent conduct. Documentation is attached to the motion, which documentation allegedly supports counsel's contentions. It is the Respondent's position that this "newly uncovered evidence" is relevant both in evaluating Tartaglia's credibility, and also as to whether she is eligible for reinstatement and backpay, assuming the undersigned were to order such a remedy.

It is the position of the Respondent that the evidence it seeks to introduce was discovered only upon complying with a subpoena served by counsel for the General Counsel, which subpoena required the production of 60 boxes of documents and materials. An initial review of these documents caused the Respondent to offer some evidence at the hearing of alleged fraudulent conduct by Tartaglia. However, upon further review of the documents following the conclusion of the hearing, the Respondent allegedly discovered many more examples of this fraudulent conduct, which the Respondent now seeks to introduce at a reopened hearing. According to the Respondent, this information constitutes "newly discovered" evidence because even though the documents were in its possession at the time of the hearing, these documents were so voluminous that the Respondent could not appreciate their significance until the General Counsel's subpoena brought the matter to the Respondent's attention. A "comprehensive manual review" of the subpoenaed documents following the hearing allegedly uncovered a significant number of these documents containing evidence of fraud. Counsel contends that this "newly discovered" evidence should now be considered at a reopened hearing, as the Respondent was unaware of its existence at the time of the hearing. See *Liquor Industry Bargaining Group*, 333 NLRB 1219 (2001); *Modern Drop Forge Co.*, 326 NLRB 1335 fn. 1 (1998).

Counsel for the General Counsel takes the position that the documents, which the Respondent seeks to have introduced at a reopened hearing, are not truly "recently discovered evidence." I agree. These documents come from the Respondent's own records. The Respondent acted at its own peril in producing the documents subpoenaed by the General Counsel without apparently adequately reviewing said documents before the hearing concluded. Simply because the documents were voluminous does not establish that the Respondent could not have adequately reviewed them prior to the conclusion of the hearing. Having introduced at the hearing some evidence of Tartaglia's alleged fraudulent conduct, the Respondent was obviously aware that such documents were in its possession. At a minimum, the Respondent could have requested that the hearing be continued to a date certain for the purpose of allowing the Respondent an opportunity to further review its documents for additional instances of alleged fraudulent conduct. However, the Respondent made no such motion prior to the conclusion of the hearing, waiting instead until six weeks after the record closed, at a time when posthearing briefs were due. The Respondent has not established that it acted expeditiously in bringing this matter to the undersigned's attention.

In my view, the documents in question do not constitute newly discovered evidence, as these documents were in the Respondent's possession at the time of the hearing, and the Respondent cannot be said to be "excusably ignorant" of their existence. Further, I believe that the Respondent has failed to satisfy the Board's standard that a party seeking to introduce evidence as newly discovered must establish that it acted with "reasonable diligence" to uncover and introduce the evidence in question. See *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 fn. 1 (1998), citing *Owen Lee Floor Service*, 250 NLRB 651 fn. 2 (1980). Therefore, I am declining to reopen the record in this case.

While I believe that the Respondent has failed to meet the Board's standard, even assuming, for the sake of argument, that it had established the evidence it seeks to introduce as newly discovered, I would still decline to reopen the record in this case. In my opinion, it would serve no useful purpose to do so, and due process would not be served by reopening the record.

The Respondent takes the position in its motion that the proffered evidence is material to the outcome of this case. Allegedly, the evidence would show that Tartaglia exercised supervisory authority, as she had the ability to directly pay employees without oversight by her superiors. Also, the evidence would allegedly affect her credibility in all its aspects. Further, a finding that Tartaglia engaged in a pattern and practice of fraudulent conduct would allegedly warrant a finding that she is not entitled to reinstatement and/or backpay, assuming that I were otherwise to find a violation of the Act. While the Respondent does not contended that it fired Tartaglia for this alleged fraud, as it was unaware of the fraudulent conduct prior to her dis-

charge, it allegedly would have fired her, had it known of her actions.

Concerning credibility, I have already indicated above that in general, I did not find Tartaglia to be a credible witness. The Respondent offered some evidence at the hearing to demonstrate that Tartaglia authorized payment to her brother for work that he did not perform. I earlier indicated that I did not credit her denial. However, a person whose testimony is incredible for certain matters, may offer credible testimony as to other matters. Such is the case with Tartaglia. I previously found that she testified credibly regarding her employment duties, responsibilities and authority. This testimony was inherently probable, supported by documentary evidence, including evaluations from her superiors, and much of it was unrebutted. Based on her testimony and other evidence, I concluded that Tartaglia was an "employee" as defined in the Act.

Counsel for the Respondent argues that if the record is reopened, he will offer additional evidence of Tartaglia's alleged fraudulent conduct, which would establish that she had a pattern and practice of paying wages to individuals who had not worked and were not entitled to payment. This, counsel contends, establishes that Tartaglia was a manager or supervisor. I disagree. Clearly, the Respondent had not authorized Tartaglia to pay individuals who had not worked. After all, it is the Respondent that is alleging said conduct to be fraudulent. Assuming, for the sake of argument, that the alleged conduct actually occurred, Tartaglia usurped that authority, which the Respondent had obviously never given her. She cannot be a manager or supervisor as defined in the Act by exercising authority, which she obtained surreptitiously, and without the consent of the Employer.

Finally, the Respondent contends that the record should be reopened to afford it the opportunity to demonstrate that because it has now become aware of Tartaglia's alleged numerous instances of fraud, it should not be required to offer her reinstatement and backpay, assuming a violation of the Act is found. Counsel for the Respondent indicated that if given the opportunity at a reopened hearing, he will offer testimony that the Respondent would have terminated Tartaglia had it known of her alleged fraudulent conduct.

I agree that evidence of Tartaglia's alleged fraudulent conduct could affect the matter of reinstatement and backpay, assuming the Respondent is able to establish that it would have terminated her had it known of her actions. However, these are remedial issues that, at this late stage in the process, could best be addressed in a compliance proceeding, if such a proceeding becomes necessary. The Board has provided a respondent with such an opportunity in the compliance stage of proceedings to show that asserted misconduct recently discovered would have provided grounds for termination based on a preexisting, non discriminatory company policy. See *ADS Electric Co.*, 339 NLRB 1020 fn. 3 (2003), citing *Arrow Flint Electric Co.*, 321 NLRB 1208, 1210 (1996). Thus, it is not necessary to reopen the record in this matter in order to give the Respondent the opportunity to argue that reinstatement and backpay are not appropriate remedies in this case. The Respondent can subsequently present such evidence at a compliance proceeding.

Based on the above, I hereby deny the Respondent's motion to reopen the record. The documents attached to this motion are not in evidence and have not been considered by the undersigned in any way in rendering a decision in this case. As noted above, I did consider the Respondent's reply memo in support of its motion to reopen the record and, therefore, I hereby deny counsel for the General Counsel's motion to strike Respondent's reply memo in support of its motion to reopen the record. Finally, the Respondent's motion to correct the transcript, unopposed by the General Counsel, is hereby granted.[16]

## CONCLUSIONS OF LAW

1. The Respondent, International Transportation Service, Inc. (ITS), is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, International Longshore and Warehouse Union, Office Clerical Unit, Marine Clerks Association, Local 63, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Informing an employee that she was being discharged because she engaged in union and protected concerted activity, specifically picket line activity on behalf of the Union.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (3) of the Act:

(a) Terminating employee Deanna Tartaglia because she engaged in union and protected concerted activity, specifically picket line activity on behalf of the Union.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee Deanna Tartaglia, my recommended order requires the Respondent to offer her immediate reinstatement to her former position, displacing if necessary any replacement, or if her position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Tartaglia whole for any loss of earnings and other benefits, computed on a quarterly basis from date of her discharge to the date the Respondent makes a proper offer of reinstatement to her, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended order further requires the Respondent to expunge from its records any references to the discharge of Tartaglia, and to provide her with written notice of such expunction, and inform her that the unlawful conduct will not be used as a basis for further personnel actions against her. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Finally, the Respon-

[16] The hearing transcript in this case is corrected as follows: p. 51, LL. 3–4 from "inference or following inference" to "interest or in furtherance of interest."; p. 76, L. 18 from "for instruction," to "for its production,"; p. 107, L. 16 from "January of 2001" to "January of 2002"; p. 166, L. 16 from "I can't that I have." to "I can't say that I have."; p. 224, L. 5 from "incredulous" to "ridiculous"; p. 242, L. 16 from "an illusive" to "a collusive"; p. 274, L. 13 from "ILWU" to "non-ILWU"; p. 328, L. 1 from "Tartaglia?"; to "Tartaglia denied?"; and p. 352, L. 25 from "no" to "know".

dent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, International Transportation Service, Inc., Long Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that they are being discharged because they engaged in union or protected concerted activity, specifically picket line activity on behalf of the Union.

(b) Terminating its employees because they engaged in union or protected concerted activity, specifically picket line activity on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Deanna Tartaglia full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Deanna Tartaglia whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Deanna Tartaglia, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities located at 1281 Pier J Avenue in Long Beach, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 8, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at San Francisco, California, on September 10, 2003.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in picket line activity on behalf of the International Longshore and Warehouse Union, Office Clerical Unit, Marine Clerks Association, Local 63 (the Union), or any other union, or for engaging in any other union or protected concerted activity.

WE WILL NOT inform you that you are being discharged for engaging in union or protected concerted activity, specifically for engaging in picket line activity on behalf of the Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal Labor Law.

WE WILL, within 14 days from the date of the Board's Order, offer Deanna Tartaglia full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Deanna Tartaglia whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Deanna Tartaglia, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

INTERNATIONAL TRANSPORTATION SERVICE, INC.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."